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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:) 1990 OAL Determination No. 17
Request for Regulatory)
Determination filed by) [Docket No. 89-024]
Donald A. Miller)
concerning the Department) December 21, 1990
of Corrections' rule)
restricting the) Determination Pursuant to
correspondence rights of) Government Code Section
inmates') 11347.5; Title 1, California
) Code of Regulations,
) Chapter 1, Article 3
)

Determination by:

JOHN D. SMITH, Director

Herbert F. Bolz, Coordinating Attorney
Victoria S. Cline, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the Department of Corrections' rule which prohibits, with specified exceptions, inmates from corresponding with other inmates or certain former inmates, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The challenged rule restricting correspondence is essentially the same as a proposed regulation previously disapproved by the Office of Administrative Law for failure to comply with the substantive and procedural standards of the Administrative Procedure Act.

The Office of Administrative Law has concluded that the challenged rule is a "regulation."

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Department of Corrections' ("Department") rule (as outlined in the July 6, 1988 memo of the California Men's Colony, San Luis Obispo) prohibiting inmate correspondence with other inmates or former inmates, with certain exceptions, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4 5 6 7 8}
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OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged correspondence restriction rule is not a "local rule" issued by a particular warden or superintendent for application to a specific institution and circumstance, but falls within the definition of a "regulation," as stated in the key provision of Government Code section 11342, subdivision (b); -
- (3) the challenged rule is not exempt from the requirements of the APA;
- (4) a regulation proposed by the Department, issued to institutions as a "guideline," and subsequently reviewed and disapproved by OAL, should not be issued or implemented by local institutions under the guise of "local rules" in order to circumvent the APA; and, therefore,
- (5) the challenged rule violates Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, the state established additional institutions, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹¹ The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"¹² namely:

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein"¹³

Authority ¹⁴

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ."
[Emphasis added.]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations ("CCR"). This policy has changed dramatically in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"¹⁵ by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."¹⁶ Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.¹⁷

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 190 CCR

pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.¹⁸ The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Addict Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of transferring all regulatory material from manuals into the CCR, and combining all six existing manuals into a single more concise "CDC Operations Manual." So far, Volumes I, II, III, V, VI, VII, and VIII of the new CDC Operations Manual have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual¹⁹ and parts of the Administrative Manual²⁰ (and unincorporated "Administrative Bulletins"²¹)--for failure to comply with APA requirements.²² OAL regulatory determinations have found the Classification Manual,²³ several portions of the Administrative Manual,²⁴ several portions of the Parole and Community Services Manual,²⁵ and several portions of the Case Records Manual²⁶ to violate Government Code section 11347.5.²⁷

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.²⁸ These plans often repeat parts of statutes, Director's Rules (i.e., codified regulations), and procedural manuals.²⁹

Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.³⁰ A two-pronged effort followed. Another bill was introduced;³¹ the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.³² Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill³³ passed the Legislature and was approved by Governor Brown.³⁴ In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]³⁵

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR.

Did the Legislature intend, however, that third tier materials, operations plans or local rules issued by particular wardens or superintendents to be applied to particular institutions, be generally subject to APA procedures? We conclude that the answer to this question is "no." In reaching this conclusion, we rely primarily on the long-established legal line of demarcation between "the rules or regulations of the Department" and rules applying only to one particular institution.

California courts have long distinguished between statewide rules and rules applying solely to one prison.³⁶ In American Friends Service Committee v. Procunier,³⁷ the case which overturned a trial court order directing the Department to adopt its "rules and regulations" pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are distinguished from

the institutional rules enacted by each warden of the particular institution affected." [Emphasis added.]³⁸

Procunier is especially significant because it was this case which the Legislature in essence overturned by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, the rules "promulgated by the Director" (emphasis added), were subject to APA requirements.

This dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as Hillery v. Enomoto (1983). The Hillery court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of general applicability."³⁹ [Emphasis added.]

Background: This Request for Determination

To facilitate understanding of the issues presented in this Determination, we set forth the following relevant statutes, regulations, case law, undisputed facts, and procedural history.

Penal Code section 2600, added in 1975,⁴⁰ provides:

"A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." [Emphasis added.]

The California Supreme Court in In re Arias⁴¹ interpreted section 2600 as follows:

"This 'necessity' test requires a showing that lesser drastic means are not available for addressing the

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reasonable security concerns they have raised.
[Citations.]^{42, 43} [Emphasis added.]

Further emphasizing the importance accorded by the Legislature to civil rights of prisoners, including both statutory and constitutional rights, section 2601 of the Penal Code guarantees certain civil rights to persons sentenced to imprisonment in a California state prison, including the right of confidential correspondence with any member of the State Bar or holder of public office.

In considering the right of prisoners to marry, the California Court of Appeal in In re Carrafa,⁴⁴ declared:

"Our Supreme Court has explained the historical setting of this statutory declaration [Penal Code secs. 2600-2601]: 'We have, in this state, "long since abandoned the medieval concept of strict 'civil death' and have replaced it with statutory provisions seeking to ensure that the civil rights of those convicted of crime be limited only in accordance with legitimate penal objectives." . . . To that end, the Legislature, in 1968, amended the 'Civil Death' statute, section 2600, to provide that certain basic rights be retained by prisoners.' [Citation omitted] . . . A prisoner may not be deprived of such a right except 'as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public.' (Pen. Code, sec. 2600.) . . . However, when state action infringes a fundamental right of the petitioner, the state action can be upheld only if necessary to effect an overriding governmental interest. The government must show that its interest cannot be satisfied by alternative methods less restrictive of the individual right abridged. Otherwise, the infringement must fail [citation omitted]."

There have been numerous cases, both California and federal, further defining the restrictions and limitations that may permissibly be placed on a prisoner's civil rights, including the right to correspond with others. The California Court of Appeal in In re Grimes⁴⁵ stated:

"California law essentially parallels the federal, but adds specific statutory protections to prisoner's constitutional rights. . . . While prisoners, as a necessary corollary of prison life, forfeit certain rights and privileges enjoyed by the general populace, they retain 'those basic rights which are not incompatible with the running of the penal institution' [citation omitted]."

The Department's Director's Rules at issue here, currently codified as Title 15, CCR, sections 3139 and 3140, provide for inmate correspondence with other inmates or with certain former inmates, with prior approval of the warden, superintendent or person in charge of the facility involved and of the case supervisor if either the sending or receiving correspondent is under parole, probation or outpatient supervision. On December 28, 1989, the Department submitted to OAL for review the amendment of section 3139 and repeal of section 3140.^{46, 47} The regulatory action would have prohibited correspondence between inmate and inmate, or inmate and former inmate, except for specified relationships, i.e., relatives, co-parents, or co-litigants. On January 29, 1990, OAL disapproved the regulatory action for failure to comply with the APA "clarity," "necessity" and "reference" standards, and procedural requirements, including lack of an adequate summary and response to all public comments.

On December 13, 1989, Donald A. Miller submitted to OAL a Request for Determination challenging a rule of the Department of Corrections restricting correspondence between inmates and inmates, or inmates and parolees. The rule, as outlined in a July 6, 1988 memo of the California Men's Colony, San Luis Obispo, states that such correspondence is limited to relatives, persons with whom the inmate has had children (other than the spouse), and co-litigants.⁴⁸

On June 8, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,⁴⁹ along with a notice inviting public comment.

On June 19, 1990, OAL invited the Department of Corrections to submit a response to this Request. No response was filed.

II. ISSUES

There are three main issues before us:⁵⁰

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

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The APA generally applies to all state agencies, except those in the "judicial or legislative departments."⁵¹ Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.⁵²

In addition, Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

We are aware of no specific⁵³ statutory exemption which would permit the Department to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

In Grier v. Kizer,⁵⁴ The California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule

is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule of the state agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified agency rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]⁵⁵

A. Part One - Does the Correspondence Restriction Rule Establish A Rule or Standard of General Application or Modify or Supplement Such a Rule?

The answer to the first inquiry is "Yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁵⁶ It has been judicially held that "rules significantly affecting the male prison population" are of general application.⁵⁷

The provisions challenged here are intended to apply to all members of a class, specifically, all inmates seeking to correspond with other inmates or parolees.

After careful consideration of the following facts, it is evident that the challenged rule is not a "local rule," applicable to a particular institution and issued by a particular warden or superintendent. Rather, it is patently clear that the Department intends the challenged rule to

apply to all inmates who might want to correspond with other inmates or parolees.

- (1) The rule at issue here is substantively identical to the regulatory action amending section 3139 and repealing section 3140 of title 15 of the CCR, which was approved by the Department, submitted to OAL for review on December 28, 1989, and subsequently disapproved. It therefore is a modification of existing regulations (rules of general application).
- (2) The rule is identical to, and an implementation of, the Department's "Guidelines for Implementation of Director's Rule (DR) 3139/3140" ("Guidelines"), issued to all facilities approximately February 1989,⁵⁸ prior to the Department's submission to OAL of the regulatory action and apparently anticipatory of OAL approval and codification. Issued prematurely (prior to submission to OAL), the "Guidelines" also were not rescinded⁵⁹ upon disapproval of the regulatory action. The issuance of the "Guidelines" to all facilities clearly indicates the Department's intent that the rule be of statewide application, not merely discretionary by a warden or superintendent of an individual facility under particular circumstances.
- (3) The "local rule" issued by the California Men's Colony at San Luis Obispo⁶⁰ is identical to the "institutional policy"⁶¹ being implemented at other facilities. The Requester states in his letter of March 26, 1990:

"The rule . . . is one being enforced at all institutions within the Department. [T]he example I provided, a memorandum at the California Men's Colony, one such institution, is but one of many, as each institution is enforcing the same rule by an identical memorandum at this time."

The Department has not sought to refute this statement.

B. Part Two - Does the Challenged Correspondence Rule Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Governs the Agency's Procedure?

The answer to the second part of this inquiry is "Yes."

Penal Code section 2600 sets forth those rights, such as the right to correspond with others (at issue in this determination), of which a person sentenced to imprisonment in a state prison may be deprived. In the Department's "Notice of Proposed Change to Regulations" for sections 3139 and 3140, the "Informative Digest" states in part: "The proposed regulations would implement and make specific Penal Code Section 2600." Although not listed as a reference citation for the regulation sections submitted to OAL (one of the grounds for disapproval of the regulatory action),⁶² Penal Code section 2600 is obviously a statute being implemented, interpreted and made specific by this rule.

Cited as partial reference for sections 3139 and 3140, both in the CCR and in the rulemaking action proposed for amending these sections, are sections 4570 and 5054 of the Penal Code. Section 4570 provides for communicating with a prisoner or detained person:

"Every person who, without the permission of the warden or other officer in charge of any State prison or prison road camp or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the State prison are located under the custody of prison officials, officers or employees, or any jail, or any county road camp in this State, communicates with any prisoner or person detained therein, or brings therein or takes therefrom any letter, writing, literature, or reading matter to or from any prisoner or person confined therein, is guilty of a misdemeanor."

Section 5054 of the Penal Code concerns control over state prisons, and provides:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director."

In listing these two Penal Code sections as "Reference" for the affected rules, the Department has in effect conceded the fact that the challenged restriction on correspondence interprets, implements, and makes specific the law enforced or administered by the agency. It is abundantly clear that the Department alone has control and responsibility for the administration of prisons and the persons confined there, including any communications to or from said persons.^{63, 64, 65}

WE THUS CONCLUDE THAT THE CHALLENGED RULE RESTRICTING INMATE CORRESPONDENCE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.⁶⁶ Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.⁶⁷ Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

"'Regulation' means every rule, regulation, order, or standard of general application . . . , except one which relates only to the 'internal management' of the state agency." [Emphasis added.]

The "internal management" exception has been judicially determined to be narrow in scope.⁶⁸ A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" under review^{69, 70} (1) affects only the employees of the issuing agency, and (2) does not address a matter of serious consequence involving an important public interest.^{71, 72}

In determining whether a "guideline" or "rule" issued by the Department of Corrections falls within the "internal management" exception, the rule can be more easily stated. The Third District Court of Appeal, in Faunce v. Denton,⁷³ indicated that the appropriate standard to apply in evaluating whether or not portions of the Department's Administrative Manual fall within the "internal management" exception was whether or not the challenged portions represent a "rule of general application significantly affecting the male prison population in the custody of the Department."⁷⁴

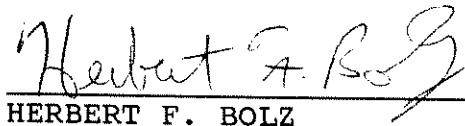
The discussion in II.A., above, provided evidence and concluded that this challenged rule is a "regulation" which has general application. Additionally, a restriction on correspondence rights has the potential to significantly affect the entire prison population in the custody of the Department, both male and female. Therefore, the "internal management" exception is inapplicable here, and the rule does not fall within this or any other established general exception to the APA.

III. CONCLUSION

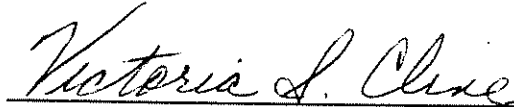
For the reasons set forth above, OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged correspondence restriction rule is not a "local rule" issued by a particular warden or superintendent for application to a specific institution and circumstance, but falls within the definition of a "regulation," as stated in the key provision of Government Code section 11342, subdivision (b);
- (3) the challenged rule is not exempt from the requirements of the APA;
- (4) a regulation adopted by the Department, issued to institutions as a "guideline," and subsequently reviewed and disapproved by OAL, should not be issued or implemented by local institutions under the guise of "local rules" in order to circumvent the APA; and, therefore,
- (5) the challenged rule violates Government Code section 11347.5, subdivision (a).

DATE: December 21, 1990



HERBERT F. BOLZ
Coordinating Attorney



VICTORIA S. CLINE
Staff Counsel

Rulemaking and Regulatory
Determinations Unit⁷⁵
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

NOTES

1. This Request for Determination was filed by Donald A. Miller, C-51648, P.O. Box 8101 (1342), San Luis Obispo, CA 93409. The Department of Corrections submitted no response.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "525" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) the comparison of two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are

invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State in accordance with the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore it was deemed] to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if

circumstances permit, for the agency to concede that point in order to permit OAL to devote its resources to analysis of truly contested issues.

The only public comment submitted in this proceeding was by the Requester. The comment was given due consideration.

The Department of Corrections did not submit a Response to the Request for Determination in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Center for \$3.00 (\$4.65 if mailed).

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the

Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
- (1) File its determination upon issuance with the Secretary of State.
 - (2) Make its determination known to the agency, the Governor, and the Legislature.
 - (3) Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - (4) Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
- (1) The court or administrative agency proceeding involves the party that sought the determination from the office.
 - (2) The proceeding began prior to the par-

ty's request for the office's determination.

- (3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 4232, 431, 268 Cal.Rptr. 244, 249.
11. Penal Code section 5000.
12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
13. Penal Code section 5054.
14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.
16. Id.
17. For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.
18. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."
[Emphasis added.]

[This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the

decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

19. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Hershops & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987).
20. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
21. "Stoneham I", supra, and "Stoneham II", supra.
22. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption

requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process. . . ."

23. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.
24. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

25. 1990 OAL Determination No. 14 (Department of Corrections) Nov. 2, 1990, Docket No. 89-021), Cal. Reg. Notice Register 90, No. 47-Z, Nov. 23, 1990, p. 1733 (portions of section 1000 and sections 1010.1, 1010.4, 1020 and 1051, PCSD Manual). Portions of the above-noted sections were found not to be "regulations."
26. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be

regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law). 1990 OAL Determination No. 13 (Department of Corrections, Nov. 2, 1990, Docket No. 89-021), Cal. Reg. Notice Register 90, No. 47-Z, Nov. 23, 1990, p. 1733. (Portions of sections 4405 and 4406, and section 4407 of the Case Records Manual were found to be regulatory; other portions and sections were either non-regulatory by virtue of the internal management exception or by restating existing law.)

27. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).
28. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy" [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).)

29. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
30. AB 1270 (Sieroty/1971).
31. SB 1088 (Nejedly/1973).
32. American Friends Service Committee v. Proconier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
33. All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.
34. AB 1282 (Sieroty/1975).
35. Section 3 of Statutes of 1975, chapter 1160, page 2876.
36. See In re Allison (1967) 66 Cal.2d 294, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); In re Harrell (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); In re Boag (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also Department of Corrections, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of

Corrections and of the particular institution. . . ." Emphasis added).

37. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
38. Id., 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
39. 720 F.2d at pp. 1135-36, n. 2.
40. Stats. 1975, chapter 1175, sec. 3.
41. (1986) 42 Cal.3d 667, 230 Cal.Rptr. 505 (Use of microphone and a sound security system in a Youth Authority chapel was in violation of section 2600 of the Penal Code).
42. Id., 42 Cal.3d at 697, 230 Cal.Rptr. at 523.
43. For a more complete discussion of the "necessity" test, see OAL Decision of Disapproval, Department of Corrections, OAL File No. 89-1228-01; California Regulatory Notice Register 90, No. 7-Z, February 16, 1990, pp. 260-262.
44. (1978) 77 Cal.App.3d 788, 143 Cal.Rptr. 848, 850-851.
45. (1989) 208 Cal.App.3d 1175, 1181, 256 Cal.Rptr. 690, 693.
46. OAL file No. 89-1228-01.
47. "3139. **Correspondence Between Inmates.**

 (a) Approval Requirements. An Inmates of a separate correctional facilities may, with specific written approval of the institution head, correspond with: each other providing prior approval of the warden, superintendent, or a person in charge of the correctional facility where the inmates are confined has been obtained. The Authority to approve or deny such correspondence may not be delegated below the staff level of correctional captain.

 (1) An inmate or ward of a correctional facility, provided the head of that facility has granted written authorization for such correspondence.

~~3140. Former Inmates.~~

~~(2) Inmates confined in departmental facilities may correspond with former inmates. Prior approval of the warden, superintendent, or person in charge of the correctional facility is required if the person was discharged from a correctional facility within the past twelve months. Prior approval of the warden, superintendent,, or person in charge of the facility and approval of the person's case supervisor is required if the person is currently under parole, probation or out-patient supervision. A person released within the past 12 months from a correctional facility, provided that if such person is under supervision of any correctional agency, written authorization for the correspondence is received from the person's case supervisor.~~

(3) A person on probation, provided such person's probation officer has given written authorization for the correspondence.

~~(b) Any exchange of written or printed material between inmates of separated or segregated sections of the same facility will require the prior approval of the warden or superintendent. The authority for approving or denying such exchange of written and printed material may not be delegated below the staff level of correctional captain.~~

(b) Relationship Requirements. Correspondence between an inmate and persons designated in (a) may be permitted only if the requested correspondent is a:

(1) Member of the inmate's immediate family as defined in section 3174(a).

(2) Person, other than the inmate's current spouse, with whom the inmate has children.

(3) Co-plaintiff, co-defendant, or witness in a current or pending court case involving the inmate.

(c) Delegation of Authority. An institution head may delegate, to a staff level not lower than correctional captain, authority to approve inmate correspondence within the meaning of this section.

~~(a) (d) Continuation of Approval. Unless restricted as provided in subsection (e), The approval to correspond will remain shall continue in effect regardless of the inmate's status, assignment or location. even though one or both of the inmates is transferred to another correctional facility of the department.~~

December 21, 1990

(e) Restriction or Forfeiture. ~~This approval to correspond may be restricted or forfeited due to for a disciplinary violations involving correspondence between the inmates and the correspondent, or as a result of a classification action based upon the institutional security needs, at either inmate's new location.~~ Any such restriction or revocation of approval ~~will~~ shall be communicated in writing to both the inmates, their correspondent and to the correspondent's facility administrators or case supervisor, as appropriate of the facilities where the inmates are housed.

NOTE: Authority cited: Section 5058, Penal Code.
Reference: Sections ~~2601~~, 4570 and 5054, Penal Code;
Procunier v. Martinez, 416 U.S. 396; and Bell v. Wolffish
[sic], 99 S.Ct. 1861."

48. The memo states:

"State of California
MEMORANDUM

Date: July 6, 1988

From: California Men's Colony, San Luis Obispo, CA 93409

Subject: APPROVALS FOR CORRESPONDENCE

Approval for correspondence between inmates and inmates or parolees requires that the person requested as a correspondent be one of the following:

1. A relative by birth, marriage or legal adoption or a person having a bonafide and verified foster relationship. Relatives shall be defined as: parents, children, legal spouses, siblings, aunts, uncles, first cousins, nephews, nieces, grandparents and grandchildren.
2. A person other than the inmate's current, legal spouse with whom the inmate has children.
3. An inmate who is a co-litigant.

It shall be the inmate's responsibility to show that the requirements have been met.

[signed]
M.K. MADDING
Associate Warden
CMC-West Facility

[signed]
A.G. INFANTE
Associate Warden
Program Services

MKM/AGF:trh"

Compare with Note 47, above.

49. California Regulatory Notice Register 90, No. 23-Z, June 8, 1990, pp. 891-892.
50. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
51. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
52. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
53. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as those listed in note 67.

Legislative intent that APA exemptions, if any, must be specifically and expressly stated in subsequent legislation, not merely implied, is evident in Government Code section 11346, which provides:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly. . . ." [Emphasis added.]

54. (1990) 219 Cal.App.3d 422, 434, 268 Cal.Rptr. 244, 251.
55. Id., 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.
56. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552; California State Employees' Association v. State of California (1990) 222 Cal.App.3d 491, 271 Cal.Rptr. 734, petition for review filed September 1, 1990. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
57. Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 188 Cal. Rptr. 130; Faunce v. Denton (1985) 167 Cal. App. 3d 191, 213 Cal. Rptr. 122.
58. Exact date unknown; there was no issuance date given on the "Guidelines." See Requester's Exhibit A.
59. According to the record before us.
60. Requester's Exhibit C (California Men's Colony memo dated July 6, 1988).
61. See Requester's Exhibit D, letter to John Ratelle, Superintendent of R. J. Donovan Correctional Facility from W. Estelle, Warden, California Men's Colony, dated December 2, 1988.
62. See Decision of Disapproval for OAL file No. 89-1228-01, California Regulatory Notice Register 90, 7-Z, February 16, 1990, pp. 263-264.

63. Reasonable censorship of printed matter which may be possessed by an inmate is necessary by prison administration, and is not denial of fundamental rights. However, absolute isolation of those incarcerated in penal institutions by ban on communication by them with outside population would constitute unreasonable exercise of power of censorship. In re Ferguson (1961) 55 Cal.2d 663, 12 Cal.Rptr. 753.
64. Though management and control of state prisons are vested in Director of Corrections, who may prescribe rules and regulations for administration of prisons and "may change them at his pleasure" (sec. 5058, Penal Code), the orders, rules or regulations prescribed by him must be reasonable, not an abuse of discretion. Id.
65. In Re Brandt (1979) 25 Cal.3d 136, 157 Cal.Rptr. 894 (the Department may not prohibit correspondence between inmates and a paroled Prisoners Union official, because of Penal Code section 2600, without a showing of necessity for reasonable institutional security and reasonable public protection); In Re Grimes (1989) 208 Cal.App.3d 1177, 1181, 256 Cal.Rptr. 690, 693.
66. Government Code section 11346.
67. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from

the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$138.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

68. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

69. Id., Armistead, Stoneham I, and Poschman.

70. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.
71. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.
72. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.
73. (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
74. Id., 167 Cal.App.3d at p. 196, 213 Cal.Rptr. at p. 125, citing Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, 135 and Stoneham v. Rushen (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20.
75. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.